



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL SUIT NO. 24 OF 2015

**IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF ABDALLA NOOMAN
BY THE PUBLIC TRUSTEE**

ZAINAB ABDALLA NOOMAN.....1ST PLAINTIFF

NAAMAN ABDALLA NOOMAN.....2ND PLAINTIFF

VERSUS

THE PUBLIC TRUSTEE.....DEFENDANT

RULING

1. Before this Court is a Notice of Motion dated 20.8.15 seeking the following orders:

- a. That this Honourable Court be pleased to strikeout the Originating Summons herein.
- b. That costs of this Application be provided for.

2. The Application is supported by the grounds on the face of it as well as the Supporting Affidavit of the J. E Maliro for the Defendant/Applicant sworn on 26.8.15. The Respondents in response to the Application filed a Replying Affidavit sworn on 14.9.15 by Zainab Abdalla Nooman on behalf of the Plaintiff/Respondents. The Defendant/Applicant filed a Further Affidavit sworn 30.9.15 which was responded to by the Plaintiff/Respondents by the Further Replying Affidavit sworn by 1.7.15 by the said Zainab Abdalla Nooman on 13.10.15.

Background

3. The 1st and 2nd Plaintiff are respectively the daughter and son of the late **Abdalla Nooman** the deceased herein who died on 3.4.71. By an Originating Summons, dated 22.8.15, the Plaintiffs/Respondents seek orders that the Defendant/Applicant, the administrator of the estate of the deceased be ordered to render full account of the estate and to distribute the estate to all the heirs of the deceased. The Defendant/Applicant has denied that he is the Administrator of the estate of the deceased and has filed the instant application seeking the striking out of the Originating Summons.

The Defendant/Applicants' Case

4. The Defendant/Applicant avers in his Supporting Affidavit that no letters of administration in respect

of the estate herein were ever issued to the Defendant/Applicant nor was the death of the deceased ever reported to the Defendant/Applicant. As such, the Defendant/Applicant lacks locus standi to be sued as legal representative of the estate; that despite the deceased having died in 1971, his death was only registered on 22nd May 2015 and therefore there is no possibility that the estate was reported to the Defendant/Applicant before that date or at all. In the Further Affidavit, the Defendant/Applicant avers that Plot No. 31 (C. R. No. 4755) does not form part of the estate of the deceased as the same belongs to one Abdalla Suleiman and that this Court therefore lacks jurisdiction to deal with the same; that the said Plot cannot be distributed before the title is challenged; that the Plaintiffs/Respondents should invoke other avenues of the law to realize their right if any as the said Plot is not in the name of the deceased. The Defendant/Applicant states that the suit is a nonstarter, discloses no cause of action, is frivolous and vexatious and the same should be struck out.

The Plaintiff/Respondents Case

5. In response to the Application, the Plaintiffs/Respondents filed the Replying Affidavit and Further Replying Affidavit and claim that the Defendant/Applicant was appointed the Administrator of the estate of the deceased and that the said administration was registered against the title of Plot No. 4755/4 belonging to the estate; that the Defendant/Applicant as administrator of the estate of the deceased ought to account for the administration of the estate herein and in particular explain the circumstances under which the said Plot was transferred to a party who is not a beneficiary of the estate of the deceased; that as administrator of the estate of the deceased the Defendant/Applicant was duty bound to ensure that the heirs of the deceased inherit the said Plot; that the Originating Summons is not frivolous and vexatious and that its pure objective is to seek legal redress for beneficiaries of the estate whose rights have not been realized; that there exists a reasonable cause of action which merits a hearing.

Determination

6. I have carefully considered the Application and the Supporting Affidavits, the Replying Affidavits as well as the submissions and the cited authorities. The issue for determination is whether or not the Originating Summons should be struck out.

7. On the striking out of suits, Order 2, Rule 15 of the Civil Procedure Rules provides as follows:

1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a. it discloses no reasonable cause of action or defence in law; or

b. it is scandalous, frivolous or vexatious; or

c. it may prejudice, embarrass or delay the fair trial of the action; or

d. it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

2. No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

3. So far as applicable this rule shall apply to an originating summons and a petition.

8. The Defendant/Applicant argues that the suit is a nonstarter, discloses no cause of action, is frivolous and vexatious and the same should be struck out and cites lack of locus standi. The Plaintiffs/Respondents for their part maintain that the Defendant/Applicant was appointed administrator of the estate of the deceased. This Court is alive to the fact that the documents annexed to the Affidavits filed by the

Plaintiffs/Respondents do not include a copy of the Grant of Letters of Administration issued to the Defendant/Applicant in respect of the estate herein. I do however note that the copy of title for Plot No. 4755/4 annexed to the Replying Affidavit of the Plaintiffs/Respondents contains the following entries made on 16.3.82 :

6. ***“Summary Certificate dated 12th March, 1982 Cause No. 7 of 1981 of the estate of Abdalla Bin Nooman – deceased to Assistant Public Trustee as Administrator”***

7. ***“Transfer dated 12th March 1982 to Abdalla Suleiman for Shs. 3,000/=”***

9. It is trite law that the striking out of any suit is a drastic and draconian measure which Courts are loathe to apply unless a suit is found to be so hopelessly incompetent that no life can be breathed into it. The Court of Appeal in the case of DT Dobie & Company (Kenya) Ltd vs. Muchina [1980] eKLR while considering the principles of striking out cases rendered itself thus-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.”

Madan JA (as he then was) adopted the following finding of Danckwerts, L. J. in Nagle v. Fielden (1966) 2 Q.B.D. 633 at p. 646.

“The summary remedy which has been applied to this action is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.”

In the same case at p. 651 Salmon, L.J., delivered himself thus

“It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly it is necessary to consider whether or not this plaintiff has an arguable case. That is the only question that arises on this appeal.”

10. The High Court has also considered the principles that guide the Court in applications under Order 2 rule 15(1)(b), (c) and (d). In Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others [2014] eKLR, **Anyara Emukule, J. observed:**

“There are well established principles which guide the court in exercise of its discretion under these rules. Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial. The court ought to act cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court.”

11. Although no Grant of Letters of Administration has been produced before this Court, the entries in the copy of title raise sufficient questions. These questions can only be answered at a full hearing of the Originating Summons at which point the trial Court shall determine whether or not a reasonable cause of action has been disclosed. It is the view of this Court that there are issues herein which are fit to go for trial and the Plaintiffs should not be driven from the judgement seat thereby depriving them of their right to have their suit determined in a full trial. Consequently the Application herein is dismissed. Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA THIS 8th DAY OF February 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Defendant/Applicant**

..... **for the Plaintiffs/Respondents**

..... **Court Assistant**